

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

MAY 20 2013

Clerk, U.S. District Court
District Of Montana
Helena

BILLINGS DIVISION

UNITED STATES OF AMERICA,

Cause No. CR 04-82-BLG-SEH
CV 12-40-BLG-SEH

Plaintiff/Respondent,

vs.

ORDER

BRIAN EDWARD BARKER,

Defendant/Movant.

On February 13, 2013, United States District Judge Richard F. Cebull denied most of Defendant/Movant Barker's claims in his motion under 28 U.S.C. § 2255.

See Order Denying Some Claims (doc. 272). On March 5, 2013, however, Judge Cebull granted the § 2255 motion as to one claim, vacated the criminal judgment, denied a certificate of appealability, and, by separate Order, set a resentencing hearing. In his Order granting the § 2255 claim, Judge Cebull indicated that judgment would not be entered in the § 2255 matter until a new criminal judgment is entered. Order (doc. 278) at 4-5 ¶¶ 1-7; Order (doc. 279).

On April 19, 2013, Barker personally filed a Notice of Appeal (doc. 281),

despite the fact that he is represented by counsel.

Generally, the filing of a notice of appeal divests a district court of jurisdiction over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). “This transfer of jurisdiction . . . is not effected, however, if a litigant files a notice of appeal from an unappealable order.” *Estate of Conners by Meredith v. O’Connor*, 6 F.3d 656, 658 (9th Cir. 1993); *Ruby v. Sec’y of the Navy*, 365 F.2d 385, 389 (9th Cir. 1966) (en banc). “[A] § 2255 order contemplating resentencing is deemed to be non-final.” *United States v. Martin*, 226 F.3d 1042, 1048 (9th Cir. 2000), and therefore not appealable under 28 U.S.C. § 1291. The reasoning of *Martin*, regarding avoidance of piecemeal appeals, *see* 226 F.3d at 1048, also precludes certification of an interlocutory appeal under 28 U.S.C. § 1292(b).

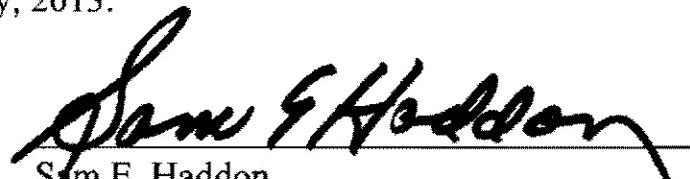
The Notice of Appeal is a nullity. This matter will proceed as if Barker had not filed it.

ORDERED:

1. The Notice of Appeal filed by Barker on April 19, 2013 (doc. 281) will be DISREGARDED by this Court.
2. Barker may not file documents in this case because he is represented by

counsel.

DATED this 20th day of May, 2013.



Sam E. Haddon
United States District Court